STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

SBC Communications, Inc.	)	
SBC Delaware Inc.,	)	
Ameritech Corporation,	)	
Illinois Bell Telephone Company	)	
d/b/a Ameritech Illinois, and	)	
Ameritech Illinois Metro, Inc.	)	
	)	Docket No. 98-0555
Joint Application for Approval of the	)	
Reorganization of Illinois Bell Telephone	)	
Company d/b/a Ameritech, Illinois, and the	)	
Reorganization of Ameritech Illinois Metro, Inc.,	)	
in Accordance with Section 7-204 of the	)	
Public Utilities Act and for All Other	)	
Appropriate Relief	)	

BRIEF ON EXCEPTIONS ON REOPENING OF
SPRINT COMMUNICATIONS COMPANY L.P.
D/B/A SPRINT COMMUNICATIONS L.P.

Dated August 17, 1999

Sprint Communications Company
L.P. d/b/a Sprint Communications L.P.

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Sprint Communications Company L.P. d/b/a Sprint Communications L.P. (Sprint) pursuant to 83 Ill. Admin. Code, CH. I, § 200.830 files its Brief on Exceptions on Reopening to the Hearing Examiners' Proposed Order (HEPO).

I. INTRODUCTION

Status quo, status quo, status quo. Joint Applicants proposed conditions adopted by the Hearing Examiners do not change the status quo. The Commission's June 4, 1999 letter and subsequent letters asked Joint Applicants specific questions regarding how the competitive harms of the merger could be mitigated. Joint Applicants' response is a model of form over substance. Joint

Applicants have placed hundreds of pages of paper before the Commission in an effort to persuade the Commission to accept the merger.

The Commission should not be fooled. The commitments contained in the reams of paper are not really commitments at all, and do not change the status quo. As Sprint presented in its Brief on Reopening, the conditions proposed by Joint Applicants and now adopted in the HEPO are “window dressing.”[1] Side exits and trap doors abound. For each commitment, there is an exception lurking around the corner that, for all practical purposes, eliminates the commitment. The commitments expire within three years. This is barely long enough for the proposed OSS changes to become effective such that CLECs effectively could order and provision the UNEs and services from Joint Applicants that are part of the proposed conditions. Most of the conditions are not self-executing.[2] Joint Applicants propose multiple collaborative processes, negotiations for incorporation into interconnection agreements and arbitrations to resolve any disputes to alleviate the Commission’s concerns. On the contrary, these processes, if implemented, are nothing more than what CLECs can do today absent the conditions. A CLEC today can attempt to import interconnection terms from another jurisdiction or incorporate all 122 of the Texas performance measurements into its Illinois interconnection agreement. Ameritech could object and the result would be an arbitration before the Commission. In one instance

[1] Tr. at 2755.

[2] See, e.g. HEPO on Reopening, p. 50; The HEPO suggests that interconnection commitment A is subject to effective enforcement measures. But Joint Applicants readily admit that there is no enforcement mechanism or penalty provision in this commitment. SBC/AM Ex. 1.4. p. 8. Joint Applicants instead rely upon arbitrations under section 252 of TA 96.

Joint Applicants' own witness Kahan confirmed that Joint Applicants interconnection commitment does not change the status quo.[3]

The purpose of merger conditions is to lower the hurdles that competitors must face to compensate for the loss of competition caused by the merger.[4] The conditions adopted in the HEPO do little to lower entry hurdles for competitors. In sum, the conditions in the HEPO do not cure the anticompetitive harms of the merger. Thus, this merger between two huge local exchange monopoly providers still poses a significant adverse effect to competition in Illinois. Sprint urges the Commission to reject the merger without imposing conditions. In the alternative, the conditions and language in the HEPO must be altered significantly. True hurdle-reducing conditions that ensure that competitors obtain parity treatment begin to mitigate the competitive harm of the merger.

Sprint encloses with this Brief a revised Proposed Order on Reopening.[5] Sprint's revisions begin to mitigate the competitive harms of the merger. In summary, to overcome the competitive harms posed by the merger, Sprint urges the Commission to:

- adopt an interconnection commitment that is truly meaningful. To lower competitive hurdles, CLECs should be able to adopt interconnection terms and arrangements from other jurisdictions (including the Texas Proposed Interconnection Agreement) without having to navigate a maze of exceptions, interconnection negotiations, and arbitrations;

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[3] Tr. at 1859; Sprint Initial Brief on Reopening, p. 23.

[4] Sprint Ex. 2.2, p. 19.

[5] Sprint has crafted the Revised Proposed Order on Reopening in a manner that assumes that the Commission approves the merger with conditions. Sprint's ultimate position, however, is that conditions cannot cure the significant adverse effects to competition in Illinois caused by the merger, and the merger should be rejected in total.

- ➢ require that OSS changes be made and tested by an independent third party before approving the merger;

- ➢ require Joint Applicants to provide market-wide and individual loop make-up information at parity with Ameritech Illinois' retail operations to encourage the deployment of advanced services by CLECs;

- ➢ require Ameritech Illinois to provide unrestricted availability to combinations of UNEs including shared transport and the UNE platform independent of the results of the FCC UNE remand proceeding. No charges beyond the TELRIC cost of the UNEs should be imposed upon CLECs. Where it deploys advanced services, Ameritech Illinois must make available the xDSL network elements on an individual basis and as part of a UNE platform;

- ➢ order that Joint Applicants comply with all reporting, measuring and other requirements that meet the business implications of LCUG 7.0 sixty days before the merger can close. If Joint Applicants choose to implement the Texas performance measurements, they must implement all 122 measurements and the parties must agree upon Illinois specific standards and penalty provisions.

Notably, these conditions must be satisfied pre-merger approval so that Joint Applicants have sufficient incentive to comply. In addition, the conditions should not sunset after three years as the HEPO suggests. Each condition should remain effective until Joint Applicants make a showing by a preponderance of the evidence that a particular condition no longer is necessary. Moreover, adoption of the conditions urged by Sprint would relieve CLECs from participating in multiple collaborative processes and arbitrations, when the collaborative process result in disagreement.

Sprint's Initial Brief on Reopening presents more specific information regarding the conditions proposed by Joint Applicants and why they do not lower competitive entry hurdles. Since the HEPO adopts the Joint Applicants' proposed conditions virtually in totality, the arguments in Sprint's Initial Brief on Reopening apply equally to the HEPO and are incorporated herein. Sprint here will focus briefly on certain specific language from the HEPO of particular interest.

II. THE MERGER SATISFIES THE POTENTIAL COMPETITION DOCTRINE

The HEPO rightly finds that the merger eliminates a significant potential competitor, SBC, that likely would enter the Illinois local exchange market. The HEPO errs in finding that the fourth element of the test is not satisfied. SBC's entry into the Illinois local exchange market would have a substantial deconcentrating effect. Absent the merger, SBC uniquely is situated to break the competitive logjam and bring the long awaited benefits of competition to the Illinois local exchange market. The HEPO is wrong in suggesting that the test for this element is whether SBC's entry would have "more of an impact on the Illinois local exchange markets than potential entrants like AT&T, MCIW, and Sprint."[6] The appropriate legal standard is articulated by the FCC as quoted in Sprint's Initial Brief on Reopening.

> There is some question as to the importance of [predicting whether the new entrant will have a pro-competitive effect in the market], since typically in an oligopolistic situation the **entry of a large firm as a new competitor necessarily has significant pro-competitive effects,** see *Ford Motor Co. v. United States*, 405 U.S. 562, 587 … (1972) … at least to the extent of 'shaking things up,' Turner, supra, 78 Harv. L. Rev. at 1383…[7]

The HEPO roundly ignores this precedent and other precedent cited by Sprint and Staff regarding this element of the potential competition doctrine. The Commission should not ignore this authoritative precedent and require that SBC

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[6] HEPO on Reopening, p. 30.
[7] BA/NYNEX Order, ¶ 139, note 264 (emphasis added).

single-handedly deconcentrate the market. The appropriate test is only whether SBC could shake up the market.

Furthermore, the HEPO wrongly declares that SBC's entry into Illinois would be limited in scope and "geared to capture large business customers."[8] This is contradictory to the evidence. Cross Exhibit 4, Joint Applicants' internal analysis of the National Local Strategy demonstrates that SBC's entry strategy out of region (which would include Illinois if the merger is not approved) projects an entry into residential and small business markets immediately. Joint Applicants project to capture 4% of the residential market and an even greater percentage of the small business market.[9] Thus, SBC does plan to enter the residential and small business markets and would do so in Illinois absent the merger. Even under the HEPO's misapplication of the standard of this element of the potential competition test, Joint Applicants' entry would deconcentrate the market.

Regarding the fifth element of the potential competition doctrine, the HEPO also ignores the relevant precedent and the expert economic testimony of Dr. Woodbury about the number of potential competitors necessary in a monopoly or virtual monopoly market. First the FCC found in the recent BA/NYNEX Order that:

> [i]n assessing just how many other significant market participants must remain for our competitive concern to diminish, we are guided by the underlying policy and economic analysis of the 1984 Merger Guidelines. **Our conclusion, however, departs from the standard articulated in those Guidelines for several reasons.**

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[8] HEPO on Reopening, p. 30.
[9] Cross Ex. 4, SBCAMIL009115.

> **First, telecommunications markets such as local exchange and exchange access services presently have only one supplier** as a practical matter or, as in the case of mass market bundled local exchange and exchange access, and long distance services, no current actual suppliers. In contrast, in the typical potential competition case the relevant markets are oligopolies with four or more competitors. In a four member oligopoly with four potential competitors, the loss of one potential competitor that leaves behind three equivalent ones still holds out the possibility of a seven-firm market. **In telecommunications markets that are virtual monopolies or that are not yet developed, however, the loss of even one significant market participant can adversely affect the development of competition and the attendant proposals for deregulation**.[10]

The HEPO does not even acknowledge this authoritative precedent. Sprint witness Dr. Woodbury also explained that the authoritative antitrust text finds a merger with the characteristics of this one to be presumptively anticompetitive.[11] The HEPO ignores the authoritative text (as characterized by Joint Applicants)[12] and the persuasive testimony of Dr. Woodbury without acknowledgement in the analysis and conclusion section. Contrary to the test employed by the HEPO, in this virtual monopoly environment it is appropriate to depart from the merger guidelines. The loss of one significant potential competitor in this virtual monopoly environment is important.

Consequently, the HEPO errs in the application of the fourth and fifth elements of the potential competition doctrine. The HEPO ignores relevant evidence and fails to recognize persuasive precedent. The Commission should adopt the language proposed by Sprint in its Revised HEPO.

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[10] Sprint Ex. 2.2, pp. 13-14 <u>citing</u>, BA/NYNEX Order at ¶ 66 (emphasis added) (citations omitted); <u>see</u> <u>also</u> <u>id</u>. at ¶ 96.

[11] Sprint Ex. 2.2, pp. 14-15 <u>quoting</u>, Areeda and Hovenkamp, *Antitrust Law* (rev. ed. 1996), Vol. III, ¶701d at pp. 134-135; Cross Ex. L.

III. THE MERGER INCREASES BARRIERS TO ENTRY

The HEPO wrongly decides that the merger does not increase the barriers to entry for competitors.[13] Sprint presented abundant unrebutted economic evidence that the merger increases the incentives and ability of the merger company to discriminate against CLECs in the first phase of this docket. This issue was not part of the Commission's June 4, 1999 letter, and thus Sprint did not present additional information regarding this competitive harm on the reopening phase of this proceeding. The Commission should review the testimony of Dr. Woodbury and Sprint's Initial Brief for an explanation of the significant adverse competitive effects that the merger poses due to the increased incentives and ability to discriminate.[14] Contrary to the suggestion of the HEPO, Sprint presented evidence about these effects of the merger. Merger review necessarily involves a look into the future about the likely effects of a merger. The evidence provided indicates a bleak future. Barriers to entry will be increased due to the merger. Sprint urges the Commission to adopt the proposed language in its Revised HEPO.

IV. THE HEPO IS CONFUSED ON THE INTERCONNECTION COMMITMENTS

The HEPO is unclear as whether it adopts Joint Applicants interconnection commitments in total. On one hand, the HEPO seems to adopt all of Joint

[12] Tr. at 2711.
[13] HEPO on Reopening, p. 29.
[14] Sprint Ex. 2.0.

Applicants interconnection commitments.[15] On the other hand, the HEPO seems to adopt the position advocated by AT&T and others, including Sprint, that the commitment's exception relating to the importation of arbitrated terms should be removed.[16] The language in condition 29 on pages 138 and 139 of the HEPO is equally confusing.

To remove any confusion, the HEPO should be revised to reflect that arbitrated terms from other states (SBC and Ameritech states) should be made immediately available to CLECs in Illinois. This type of condition begins to lower the competitive hurdles for CLECs. For example, if the Texas PIA was made available under this provision, many of the problems identified by Sprint with the other conditions would go away. The Texas PIA already contains all 122 performance measurements that capture the business implications of LCUG 7.0 and has extensive provisions regarding the availability of the UNE platform and collocation policies. Sprint's revised HEPO includes language that clarifies the importation of arbitrated terms issue. Sprint urges the adoption of that language.

V. CONCLUSION

The Commission acted correctly in finding that the original record in this matter did not support a finding that the merger would not have a significant adverse effect on competition. The same is still true. As explained herein and in Sprint's Initial Brief on Reopening, the proposed conditions do not change the

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[15] HEPO on Reopening, p. 50; "We conclude that Joint Applicants' proposed commitment is responsive to our questions . . ."

[16] HEPO on Reopening, p. 50; "We believe one of AT&T's proposals best meets the problems outlined by SBC and the CLECs. Joint Applicants should provide CLECs . . . [terms it] has been ordered to provide under arbitration in another state."

status quo. CLECs will face increased hurdles to entry into the Illinois competitive market as a result of the merger. The proposed conditions do not lower those hurdles. The Commission should reject the merger outright because no set of conditions can be crafted to cure the competitive harms of the merger. In the alternative, the Commission should adopt the conditions proposed by Sprint. Satisfaction of these conditions pre-merger approval and with no expiration date to the conditions begins to mitigate the competitive harms of the merger.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing were served on all parties on the attached service list on the 17th day of August, via U.S. mail.

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Sally J. Werts